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# Federal Venue: Locating the Place Where the Claim Arose

Diane Pamela Wood

Venue, because it receives so little attention from the appellate courts, sometimes seems to be the forgotten cousin in the family of federal procedure. Fathered by the Constitution itself is the concept of subject matter jurisdiction, whose imperatives circumscribe every federal case.<sup>1</sup> Of like importance is personal jurisdiction, which dictates when a person or res has fallen under the power of the court.<sup>2</sup> The place of venue in this hierarchy has often seemed obscure: the concept enjoys statutory sanction, but its status falls below that of jurisdiction. This second class citizenship is precisely what venue merits, if amount of time invested in litigating is the measure of importance. The entire thrust of procedural reform in this century has been toward shifting the center of litigational gravity from procedures to the merits.<sup>3</sup> In keeping with this general philosophy, the goal of the statutory venue system should be to consume as little judicial time as is consistent with overall fairness to all the parties to the lawsuit.

The concept of venue, that there is a particular place where trial should be held,<sup>4</sup> is as old as the separation of the king's general court

1. U.S. CONST. art. III enumerates the types of cases or controversies over which the federal courts may exercise jurisdiction and specifies the Supreme Court's original jurisdiction. With the exception of the Court's original jurisdiction, the power of the federal courts to hear cases depends on both constitutional and statutory grants of subject matter jurisdiction. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 8, 10 (2d ed. 1970). This rule is inflexible; any time it appears that subject matter jurisdiction is lacking, the court is duty-bound to dismiss the case sua sponte. *E.g.*, *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

2. The classic case that describes the rationale behind personal jurisdiction is *Pennoyer v. Neff*, 95 U.S. 714 (1878). In modern times, the original territorial *raison d'être* of the concept has become attenuated within the fifty states. It has been replaced by the twin ideas of fair play and substantial justice, enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Fair play and substantial justice depend on certain "minimum contacts" with the jurisdiction, according to *International Shoe*; this standard still remains the due process test for the outer limits on the court's power to command the presence of a person or to adjudicate the status of a res. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235 (1958); *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975).

3. See, e.g., 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029, at 128 (1969).

4. See *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir.), cert. denied, 396 U.S. 918 (1969); *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp.

into the specialized courts of the Exchequer, Common Pleas, King's Bench, and Chancery.<sup>5</sup> Originally, venue was the servant of the court's convenience and assured the availability of jurors who knew the facts of a case.<sup>6</sup> As time passed, the overriding concern of venue law underwent a complete transformation, shifting from the court to the litigants, both in England and in the United States. Thus, in the leading case of *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,<sup>7</sup> the Supreme Court could state as settled law that "the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition."<sup>8</sup> In a later case, the Court remarked that "the venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate . . . forum."<sup>9</sup>

To establish the convenience of litigants as the paramount concern, however, is only to pose a new question, for the interests of the two parties may well diverge. A choice between plaintiff and defendant may be unavoidable. Perhaps the primary consideration should be to protect the defendant, since he does not control the litigation. Alternatively, perhaps the goal ought to be to ensure that the plaintiff does not lose his day in court because of the expense and difficulty of litigating far from home. Ideally, the location of each trial would optimize the interests of protection of defendant, fairness to plaintiff, speed of trial, and availability of witnesses. Barring achievement of this ideal, if liberal transfer statutes can protect the defendant adequately, and modern transportation facilities can minimize evidentiary problems, then it makes sense to give effect to the plaintiff's initial choice of venue, assuming that he chooses a forum with a logical relation to his claim. This solution facilitates reaching the merits without lingering on procedural

219, 224 (D.N.J. 1966). Venue should be distinguished from jurisdiction, which relates to the court's power to act. See *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc.*, 343 F.2d 7 (8th Cir. 1965); *Brown v. Pyle*, 310 F.2d 95 (5th Cir. 1962).

5. Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1 (1949). The first court to become settled in one place was the Exchequer, which established its permanent residence sometime before the end of the twelfth century. *Id.* at 2-3. At the same time the notion of an appropriate location for the lawsuit emerged, these early courts also became specialized as to subject matter jurisdiction.

6. *Id.* at 3, 20.

7. 308 U.S. 165 (1939).

8. *Id.* at 168. See *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340 (1953); *Time, Inc. v. Manning*, 366 F.2d 690, 696 (5th Cir. 1966); *Riley v. Union Pac. R.R.*, 177 F.2d 673, 675 (7th Cir. 1949), *cert. denied*, 338 U.S. 911 (1950).

9. *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 (1972).

details, and it permits plaintiffs to enforce their legal rights without undue hardship.<sup>10</sup>

### I. The 1966 Amendment to 28 U.S.C. Section 1391: Background and Purpose

The central statute governing federal venue today, 28 U.S.C. Section 1391,<sup>11</sup> establishes venue for all cases in the federal courts, subject to specific provisions in other statutes.<sup>12</sup> In addition to statutory limitations, section 1391 is still fettered by the traditional distinction between local actions and transitory actions, tautologically explained by Chief Justice Marshall as follows:

The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local.<sup>13</sup>

When the federal venue statutes mention the term "local," they assume that its meaning is clear.<sup>14</sup> This assumption may be sadly unwarranted,

10. Candidly, this is a plaintiff-oriented solution. It is, however, consistent with the procedural rules requiring a liberal reading of the complaint, *see* FED. R. CIV. P. 8(f), and a generous attitude toward amendments to pleadings, *see* FED. R. CIV. P. 15.

11. 28 U.S.C. § 1391 (1970).

12. Some statutes completely supplant the provisions of § 1391. *E.g.*, 28 U.S.C. § 1400 (1970) (patents and copyrights), *construed in* *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957); 28 U.S.C. § 1394 (1970) (national banking associations), *construed in* *First Nat'l Bank v. Williams*, 252 U.S. 504 (1920). In other cases some dispute exists whether the general statute and the specific are supplementary or exclusive. *Compare* *Manufacturers Buyers Corp. v. El Dorado Tire Co.*, 324 F. Supp. 225 (S.D. Fla. 1971) (antitrust venue provision, 15 U.S.C. § 15 (1970), preempts § 1391), *with* *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169 (S.D.N.Y. 1970) (specific antitrust venue supplements § 1391). *See also* *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F. Supp. 812 (E.D. Pa. 1972) (supplementary). Note, however, that § 1391 specifies venue "except as otherwise provided by law."

13. *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (No. 8411) (C.C.D. Va. 1811). Local actions normally deal with land matters, such as trespass, injury to real estate, and title. *See* *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895); *Miller v. Davis*, 507 F.2d 308, 316 n.16 (6th Cir. 1974); *Elk Garden Co. v. T.W. Thayer Co.*, 179 F. 556 (4th Cir. 1910). Transitory actions are then defined negatively, since they are not tied to any specific res; if an action is not local, it is transitory, and the court must acquire jurisdiction over the defendant's person. *See* *Stone v. United States*, 167 U.S. 178 (1897); *Sax v. Sax*, 294 F.2d 133 (5th Cir. 1961); *Mausser v. Union Pac. R.R.*, 243 F. 274 (S.D. Cal. 1917).

Later courts have protested the tyranny of the old rule, one judge complaining that "... it is not easy to escape the past, and the tentacles of the common law causes of action survive as a tangled web requiring careful attention to outmoded procedural concepts." *Wheatley v. Phillips*, 228 F. Supp. 439, 440 (W.D.N.C. 1964) (Craven, C.J.). The rule nevertheless persists.

14. Two statutes expressly recognize "local" suits: 28 U.S.C. § 1392 (1970) (venue where defendants reside in different districts of the same state); *id.* § 1393 (venue in proper division of district).

for as a matter of practice courts hold both that state law defines a local action and that state law fixes its venue.<sup>15</sup> Section 1391 therefore applies only to transitory actions,<sup>16</sup> although in point of fact transitory actions do make up the vast bulk of federal business. Supplementing the general venue statute are two critical provisions that permit transfer of venue under special circumstances: section 1404(a),<sup>17</sup> allowing transfer for the convenience of parties and in the interest of justice, and section 1406(a),<sup>18</sup> allowing transfer or dismissal when the claim is filed in the wrong district or division. Relative newcomers to the venue system,<sup>19</sup> these provisions supply needed flexibility<sup>20</sup> and give defendants protection against truly inconvenient forums. On the negative side, they have filled the law reports with an inordinate number of venue decisions, because the courts have interpreted the permissible transfer districts very restrictively.<sup>21</sup> Nevertheless, the ease of transfer is directly related to the number of authorized districts in the first place; thus if the general venue statute is expanded through legislation or interpretation, the transfer statutes will follow suit.

Section 1391 has progressed through several permutations since the Judiciary Act of 1789 originally provided for venue in civil cases.<sup>22</sup> Its direct ancestor was the Act of March 3, 1887, as corrected a year

15. *Mississippi & Mo. RR. v. Ward*, 67 U.S. (2 Black) 485 (1863); *Tuscarora Nation of Indians v. Power Authority*, 161 F. Supp. 702 (S.D.N.Y.), *cert. denied*, 358 U.S. 841 (1958); *Hasburgh v. Executive Aircraft Co.*, 35 F.R.D. 354 (W.D. Mo. 1964). *See generally* C. WRIGHT, *supra* note 1, § 42, at 157-58.

16. *E.g.*, *Elk Garden Co. v. T.W. Thayer Co.*, 179 F. 556 (4th Cir. 1910); *Pellerin Laundry Mach. Sales Co. v. Hogue*, 219 F. Supp. 629 (W.D. Ark. 1963); *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963). *See generally* 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 72, at 362 (Wright ed. 1960).

17. 28 U.S.C. § 1404(a) (1970).

18. *Id.* § 1406(a).

19. The transfer provisions were added in the 1948 revision of the Judicial Code. *See generally* C. WRIGHT, *supra* note 1, § 44, at 162 & n.1.

20. Nevertheless, both transfer provisions are indirectly limited by the original venue statute: § 1404(a) permits transfer only to a district or division where the claim "might have been brought," and § 1406(a) is similarly limited to the place where it "could have been brought."

21. *See Hoffman v. Blaski*, 363 U.S. 335 (1960); Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965); Note, *The Problems Regarding the Federal Transfer Statute—Much Ado About Nothing*, 42 ST. JOHN'S L. REV. 93 (1967).

22. The Act provided:

[N]o civil suit shall be brought . . . against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . .

Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 79. For a discussion of the historical development of the venue laws see Barrett, *Venue and Service of Process in the Federal Courts—Suggestions For Reform*, 7 VAND. L. REV. 608, 609-12 (1954).

later.<sup>23</sup> The 1887 Act awkwardly stated that suit should not be brought in

any other district than that whereof [the defendant] is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.<sup>24</sup>

Why Congress chose to be more generous in diversity cases than in the new federal question cases has remained a mystery;<sup>25</sup> nevertheless, the discrepancy has survived several revisions and persists in the law today.<sup>26</sup> Little change took place until the 1948 revision of the Judicial Code, and even then the alterations were comparatively minor phrasing changes.<sup>27</sup>

In 1959, the Judicial Conference of the United States recommended that the general venue statute be broadened for tort actions to include the place where the tort was committed.<sup>28</sup> Three years later, the Conference endorsed a more sweeping change, which would have added as a permissible venue any district where the claim arose.<sup>29</sup> Congress responded cautiously in 1963 with an amendment permitting venue in automobile tort cases in the district where the act or omission occurred.<sup>30</sup>

23. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, as amended by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433.

24. *Id.*

25. The choice is baffling for several reasons. First, both the initial justification for diversity jurisdiction and its continuing merit have been hotly debated. See generally P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1053-59 (2d ed. 1973); C. WRIGHT, *supra* note 1, § 23. Second, one would think that Congress would want to facilitate federal question cases in the federal courts, because the federal courts would have a body of expertise to contribute, but Congress did not confer general federal question jurisdiction on the federal courts until it passed the Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

26. No change in this aspect of the statute was made in the 1948 revision of the Judicial Code. See Act of June 25, 1948, ch. 646, 62 Stat. 935. Neither was it changed in the subsequent amendments contained in the Acts of Oct. 5, 1962, Pub. L. No. 87-748, § 2, 76 Stat. 744; Dec. 23, 1963, Pub. L. No. 88-234, 77 Stat. 473; and Nov. 2, 1966, Pub. L. No. 89-714, §§ 1, 2, 80 Stat. 1111.

27. In place of the phrase "whereof he is an inhabitant" the revisor put the word "reside[s]." Act of June 25, 1948, ch. 646, 62 Stat. 935. The other change brought the statute into harmony with the Supreme Court's construction of its meaning by substituting "all plaintiffs" and "all defendants" for the singular of those terms. *Id.* See *Smith v. Lyon*, 133 U.S. 315 (1890).

28. Annual Report of the Proceedings of the Judicial Conference of the United States, at 316 (1959).

29. Annual Report of the Proceedings of the Judicial Conference of the United States, at 11 (1962).

30. Act of Dec. 23, 1963, Pub. L. No. 88-234, 77 Stat. 473 (codified at 28 U.S.C. § 1391(f)).

## Federal Venue

Even with the 1963 patchwork, section 1391 was still in serious need of mending. Perhaps the most appalling aspect was the gaping hole that existed in multiple-party diversity actions: unless all of the plaintiffs or all of the defendants resided in a single district, the action simply could not be entertained in federal court,<sup>31</sup> however satisfactory jurisdiction and process might be. In a federal question case, it was enough to bar venue if two defendants resided in different districts. If the parties in the latter case were unfortunate enough to have suffered an injury cognizable exclusively in the federal courts, they were utterly denied the right to sue. Even if they were not literally locked out of court, they were frequently compelled to litigate in a district convenient to neither side.<sup>32</sup> Because courts strictly construed "residence" to mean legal domicile,<sup>33</sup> the cases were legion in which the parties faced the dismal prospect of litigating miles from home, witnesses, and records. The vagaries of state process statutes posed yet another problem, particularly for a plaintiff relying on his own residence for venue in a diversity case. Whether his own state's long-arm statute could reach the defendant was a matter of pure fortuity. Finally, Congress again failed to eradicate the anomaly permitting more venue options in diversity cases than in federal question cases.<sup>34</sup>

In 1966, Congress attempted once again to cure the deficiencies in the venue system. Responding to the continued pressure of the Judicial Conference<sup>35</sup> and to the criticisms of commentators and scholars,<sup>36</sup> it added the district "in which the claim arose" to subsections (a)<sup>37</sup> and (b)<sup>38</sup> of section 1391, and repealed the special automobile subsection.<sup>39</sup>

31. C. WRIGHT, *supra* note 1, § 42, at 151; Barrett, *supra* note 22, at 621.

32. C. WRIGHT, *supra* note 1, § 42, at 151; Barrett, *supra* note 22, at 612. The transfer provisions could not alleviate this situation since the original scope of venue was so narrow. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

33. *King v. Wall & Beaver St. Corp.*, 145 F.2d 377, 379 (D.C. Cir. 1944); *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970).

34. See note 25 *supra*.

35. See S. REP. NO. 1752, 89th Cong., 2d Sess. 1 (1966).

36. E.g., Barrett, *supra* note 22, at 608-09; Blume, *supra* note 5, at 39-40. See also Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1951) (discussion of state venue statutes).

37. Act of Nov. 2, 1966, Pub. L. No. 89-714, § 1(a), 80 Stat. 1111, amending Act of June 25, 1948, ch. 646, § 1391(a), 62 Stat. 935, codified at 28 U.S.C. § 1391(a) (1970) (actions based solely on diversity).

38. Act of Nov. 2, 1966, Pub. L. No. 89-714, § 1(b), 80 Stat. 1111, amending Act of June 25, 1948, ch. 646, § 1391(b), 62 Stat. 935, codified at 28 U.S.C. § 1391(b) (1970) (actions not based solely on diversity).

39. Act of Nov. 2, 1966, Pub. L. No. 89-714, § 2, 80 Stat. 1111, repealing Act of Dec. 23, 1963, Pub. L. No. 88-234, 77 Stat. 473.

The meager legislative history of the amendment sheds no light on why Congress chose this particular wording over numerous possible alternatives.<sup>40</sup> The suggested phrasings included "where the cause of action or part arose,"<sup>41</sup> "where the cause of action, or part thereof, arose or accrued,"<sup>42</sup> and the American Law Institute's "[where a] substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."<sup>43</sup> Although the reports and debates indicate that Congress may not have foreseen the wide application of the new law,<sup>44</sup> experience under the amendment has proven it useful in areas as diverse as antitrust,<sup>45</sup> patent and trademark infringement,<sup>46</sup> securities law,<sup>47</sup> and labor law.<sup>48</sup> The courts, perhaps better able to see the forest for the trees, have consistently viewed the amendment as part of a general trend to expand venue wherever possible.<sup>49</sup>

By opening up the forum in which the claim arose, the amendment eliminated with one stroke the most egregious shortcoming of the former

40. The Senate Report on the bill consisted of an uninformative quote from the House Report:

This enlargement of venue authority will facilitate the disposition of both contract and tort claims by providing, in appropriate cases, a more convenient forum to the litigants and the witnesses involved.

S. REP. NO. 1752, 89th Cong., 2d Sess. 1-2 (1966). Yet the chief sponsor of the bill in the House reassured another member that the legislation would not affect tort venue at all, as it was aimed only at minor changes in contract actions. 112 CONG. REC. 21756 (1966) (remarks of Representative Brooks).

41. Blume, *supra* note 5, at 39.

42. Stevens, *supra* note 36, at 310.

43. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN THE STATE AND FEDERAL COURTS §§ 1303, 1314 (1969) [hereinafter cited as ALI STUDY]. Tentative Draft No. 2, 1964, contained essentially the same language.

44. See note 40 *supra*.

45. *E.g.*, *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc.*, 333 F. Supp. 187, 193 (D. Neb. 1971); *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169, 170 (S.D.N.Y. 1970).

46. *E.g.*, *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 374 F. Supp. 184, 189-90 (D. Del. 1974) (trademark); *Uniroyal, Inc. v. Sperberg*, 63 F.R.D. 55, 59-60 (S.D.N.Y. 1973) (declaratory judgment for patent).

47. *E.g.*, *Alameda Oil Co. v. Ideal Basic Indus., Inc.*, 313 F. Supp. 164, 168-69 (W.D. Mo. 1970); *Smith v. Murchison*, 310 F. Supp. 1079, 1089 (S.D.N.Y. 1970).

48. *E.g.*, *Brotherhood of Locomotive Eng'rs v. Denver & R.G.W.R.R.*, 290 F. Supp. 612, 615-16 (D. Colo. 1968), *aff'd*, 411 F.2d 1115 (10th Cir. 1969).

49. *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1224-25 (5th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970). See *Gardner Eng'r Corp. v. Page Eng'r Co.*, 484 F.2d 27, 33 (8th Cir. 1973); *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169, 170 (S.D.N.Y. 1970); *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 259 (E.D. Pa. 1968). *Cf.* *Pure Oil Co. v. Suarez*, 384 U.S. 202, 204-05 (1966) (liberalizing purpose underlies 1948 amendment to § 1391(c)). *But see* *Honda Associates, Inc. v. Nozawa Trading, Inc.*, 374 F. Supp. 886, 891-92 (S.D.N.Y. 1974).



statute: a district will now always exist in which venue will lie. This alone made it a significant improvement in federal venue. Still, since some of the old problems refused to vanish,<sup>50</sup> it was far from a panacea for known difficulties. Worse yet, new ambiguities and questions materialized where none had existed before.

## II. The 1966 Amendment in Operation

### A. Construction

From the beginning, commentators predicted that the new language would breed litigation.<sup>51</sup> Shortly after the statute became effective, the Supreme Court had occasion to comment on its scope in *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen*.<sup>52</sup> The Court, in the course of deciding to apply the amendment retrospectively, held unequivocally that the new phrase left the substantive law applicable to a case unchanged because its effect was wholly procedural.<sup>53</sup> The Court's only additional opportunity to consider the statute arose peripherally in the opinion in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*<sup>54</sup> There it stressed that the 1966 amendment was intended to close the gap in venue law that had existed for multiple-plaintiff or multiple-defendant cases, saying simply that "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap."<sup>55</sup> Avoidance of gaps and care not to permit substantive changes because of the amendment seem straightforward guidelines as far as they go. Nevertheless, the lower courts have had a more difficult time with the amendment than this scanty appellate attention would indicate.

The first problem in construing the new language lies in the provision that venue will lie in "the" district where the claim arose. Logically, the use of the definite article ought to imply that only one district exists that matches the description, but this reading is undesir-

50. E.g., the narrower scope of federal question venue and the dependency on state long-arm statutes.

51. See Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 78 (1968). Foster feared that the phrase would "unnecessarily [invite] litigation," preferring the ALI proposal.

52. 387 U.S. 556, 563 (1967).

53. *Id.* Justice Black agreed in his dissent that the amendment applied to pending cases. *Id.* at 570. The Fifth Circuit followed the directive to apply the amendment retroactively in *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217 (5th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

54. 406 U.S. 706, 710 n.8 (1972).

55. *Id.*

able because the policies behind the venue statute would allow most claims to be adjudicated in any one of several districts.<sup>56</sup> For pragmatic reasons, therefore, the courts have been receptive to the idea that "the" judicial district can refer to any district in which a substantial or significant part of the claim arose.<sup>57</sup> Related to the question of the number of permissible districts is the meaning of "the claim." It might mean the largest part of a claim (or the whole claim, whatever that would be), but it might mean either a substantial part of a claim, or just any part that was not de minimis.<sup>58</sup> If either of the latter two constructions were adopted, the effect would be to allow nonexclusive districts in by the back door. On the other hand, it is difficult to pin down a satisfactory definition of a "claim." One court bravely tried, holding that "claim" meant "the aggregate of operative facts giving rise to a right enforceable in the courts,"<sup>59</sup> but nothing assures that the facts are susceptible to aggregation in such a way as to point to one and only one district for venue. This implication that only one district must be found is one of the greatest weaknesses of the new statute.

Even if it were possible to know with certainty what a claim was and how much of it was required to establish venue, it would still be difficult to determine where it "arose." Substantive law often assigns one place rather arbitrarily as the place where the claim arose, such as the place of execution or place of performance in contract law or the place of manufacture or place of sale in products liability law.<sup>60</sup> Federal law obviously governs this issue in a federal question case, but the courts have become hopelessly confused over which law governs in a diversity

56. For example, in an antitrust case many districts might serve the convenience of the parties equally well. To fix the locus of the claim in any one place could be extremely artificial. The same is true of products liability cases. Cf. Comment, *Choice of Law: Statutes of Limitations in the Multistate Products Liability Case*, 48 TUL. L. REV. 1130 (1974).

57. See generally Judge Friendly's suggestion in *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1382 n.4 (2d Cir. 1970); *Carter-Wallace, Inc. v. Ever-Dry Corp.*, 290 F. Supp. 735, 739 (S.D.N.Y. 1968). Cf. *Rosen v. Solomon*, 374 F. Supp. 915, 919-20 (E.D. Pa. 1974) (immaterial for personal jurisdiction that contract may have had significant connections with other states). See generally ALI STUDY, *supra* note 43.

58. *Honda Associates, Inc. v. Nozawa Trading, Inc.*, 374 F. Supp. 886, 890 (S.D.N.Y. 1974). The *Honda Associates* court found it unnecessary to decide between "largest" and "substantial." Earlier, the Eighth Circuit had followed the ALI's definition and used "substantial." *Gardner Eng'r Corp. v. Page Eng'r Co.*, 484 F.2d 27, 33 (8th Cir. 1973). See ALI STUDY, *supra* note 43, §§ 1303(a)(1), 1314(a)(1).

59. *Ryan v. Glenn*, 52 F.R.D. 185, 192 (N.D. Miss. 1971); accord, *Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp.*, 358 F. Supp. 1345, 1347 (S.D. Tex. 1973); *Uniroyal, Inc. v. Sperberg*, 63 F.R.D. 55, 59 (S.D.N.Y. 1973).

60. E.g., *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970). Cf. TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

case,<sup>61</sup> forgetting that venue, as a procedural matter, does not come under the rule of *Erie Railroad v. Tompkins*.<sup>62</sup> As a result, plaintiffs in some districts must ascertain the place where the claim arose under state law, and in other districts they must apply federal law.

### B. Venue Versus Choice of Law

A corollary problem to the construction of the statute, reminiscent of conflicts of law, is the question which district court's decision will determine the law of the case insofar as venue is concerned. This complication arises only if one party attempts to transfer the case to another district under section 1406(a),<sup>63</sup> which governs transfer when the first venue is "wrong." If plaintiff sued in the Western District of Texas, but that court decided that the claim really arose in the Central District of California, upon request the Texas court would transfer the case to the California court. The California court would then probably be free to make its own determination of where the claim arose under the reasoning of *Hoffman v. Blaski*.<sup>64</sup> In that case, Blaski had brought a patent infringement suit in the Northern District of Texas. Defendants moved to transfer to the Northern District of Illinois, a place where plaintiff did not have the right to sue initially. Granting the motion, the Texas court transferred the case; the Fifth Circuit refused to vacate the district court's order. In Illinois, plaintiffs moved to remand the case to the Texas court. Although the district judge denied this motion, the Seventh Circuit granted a writ of mandamus ordering him to remand. The Fifth and Seventh Circuits were then in direct conflict over the question whether a district court had the power to transfer to a district where plaintiff did not have the right to sue. The Supreme Court affirmed the Seventh Circuit, holding that the Illinois court had the duty to determine venue for itself.<sup>65</sup> Thus, by analogy to the *Hoffman* situation, if the California court in the example above disagreed with the

61. See, e.g., *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968).

62. 304 U.S. 64 (1938) (Rules of Decision Act, 28 U.S.C. § 1652 (1970), requires federal courts to follow state substantive law, both statutory and judge-made, in a diversity case).

63. This type of problem might be less likely to arise with a § 1404(a) transfer, since by hypothesis the first district is permissible under the statute. But see *Hoffman v. Blaski*, 363 U.S. 335 (1960).

64. 363 U.S. 335 (1960).

65. At least one district court has expressed great frustration and dissatisfaction with the practical effect of the *Hoffman* result. *Ferri v. United Aircraft Corp.*, 357 F. Supp. 814, 816 (D. Conn. 1973).

Texas court and felt that the claim did arise in the Western District of Texas, it would be free to transfer the case back to Texas. The specter appears of the two courts sending the case back and forth ad infinitum—the renvoi dilemma of conflicts.<sup>66</sup> The absurdity of this result is apparent. In the interest of efficient treatment of procedural issues like venue, the first court's conclusion should be binding for that litigation. *Hoffman* poses an obstacle to this solution only if it is extended to the amended language of section 1391. As Justice Frankfurter so cogently pointed out in his dissent to *Hoffman*,<sup>67</sup> a litigant should not be kept perpetually shuttling from one district to another until the Supreme Court rescues him; the statute should either make the first court's determination final or at least minimize the likelihood of initial refusal by broadening venue.

*Hoffman*'s renvoi-like problem illustrates only one instance in which the determination of federal venue seems to borrow concepts from choice of law. Many of the tests that courts are evolving to ascertain where a claim arose also derive from conflicts doctrine.<sup>68</sup> This superficial similarity, however, should not obscure the fundamentally different policies underlying the two areas. The movement in conflicts analysis is away from a rigid, rule-oriented determination of the governing jurisdiction towards a flexible, policy-oriented interest analysis that considers many factors.<sup>69</sup> Because the very law of the case depends on the resolution of the interests of competing jurisdictions, a careful, policy-oriented approach is fully justified. Venue, in contrast, has no bearing at all on the parties' substantive rights. Under *Erie* and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>70</sup> any federal court should apply the same law on the merits. A matter that is solely a secondary procedural question warrants a more predictable, mechanical approach. Cer-

66. Renvoi, defined in RESTATEMENT (SECOND) OF CONFLICTS § 8 (1971), covers the situation in which the forum state is directed by its own choice of law rule to apply "the law" of another state. The Restatement specifically provides that "the law" refers to local law exclusive of the choice of law rules in this particular context. Only in rare instances, set out in Comment b to § 8, will the forum also apply the choice of law rules of the second state. Otherwise, the problem of each state referring back to the other would arise.

67. 363 U.S. at 345. Frankfurter argued that a single judicial appellate remedy should be enough, stating that "a prior decision of a federal court on the unfundamental issue of venue ought to receive a similar respect from a coordinate federal court when the parties and the facts are the same." *Id.* at 350.

68. Among others are the weight of contacts test and the place of injury test discussed below.

69. See generally Wechsler, *Introduction to RESTATEMENT (SECOND) OF CONFLICTS* vii-ix (1971).

70. 313 U.S. 487 (1941).

tainly the risk of ending up in the "wrong" district is much less than the risk of having the wrong substantive law govern the parties' rights. Venue's orientation toward convenience may thus argue for a more automatic test than the interest analysis approach of choice of law.

### C. *Approaches for Determining Where the Claim Arose*

A bewildering array of approaches has evolved, all purporting to guide a court in deciding where a claim arose. Some courts, apparently unaware that any tests exist, merely state their conclusions without further elucidation. The opinions of other courts, while failing to cite relevant cases or mention any specific "test," conform to one or more categories after the fact. Finally, some judges have made an explicit attempt to articulate a useful test and to apply it to the facts before them. Yet even in this third category, a court may confront a dismaying number of approaches in a new fact situation. The number of tests, in itself an indication of the statute's shortcomings, renders it difficult to predict which line of thought will appeal to a given judge in a particular case. This in turn makes it difficult for the litigant to know whether or not he has selected a proper forum. Of course, if he has guessed incorrectly, the court would probably grant a section 1406(a) transfer, but most plaintiffs would prefer to avoid the delay inherent in the transfer process. In addition, the uncertainty of the area encourages defendants to litigate the question of venue rather than to accept the place of trial and move on to the merits. Even so, the following examination of each of the current tests shows that they are approaching a workable analysis, and that they are clearly preferable to no discussion at all.

1. *Weight of contacts.*—One of the more widely used approaches inquires where the "contacts" weigh most heavily.<sup>71</sup> This test

71. The weight of contacts test was probably borrowed from the area of conflicts of law. See RESTATEMENT (SECOND) OF CONFLICTS §§ 6, 9 (1971).

Herbert Wechsler's Introduction to the Second Restatement of Conflicts describes "the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility" represented in the revised version:

Restatement Second supplants these [vested-rights] rules by the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has "the most significant relationship" to the occurrence and the parties. The "factors relevant" to that appraisal, absent a binding statutory mandate, are enumerated generally (§ 6) to "include":

"(a) the needs of the interstate and international systems,

"(b) the relevant policies of the forum,

"(c) the relevant policies of other interested states and the relative in-

was inaugurated in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,<sup>72</sup> an antitrust action in which the plaintiffs unsuccessfully tried to preserve venue by using the general venue statute as a supplement to the Clayton Act venue provision.<sup>73</sup> Although the court found no fault with this as a matter of law,<sup>74</sup> it found that venue failed even under the more generous statute, since the claim did not arise in its district. It explained its test as follows:

"[W]here the claim arose" should be dependent upon where the contacts weigh most heavily. A "weight of the contacts" test would enable venue to exist in a district where the injury occurred, if significant sales causing substantial injury were made to plaintiffs there by defendants. If some other overt act pursuant to the conspiratorial meetings took place in a district and it was a significant and substantial element of the offense, then venue would lie in that district.<sup>75</sup>

As the court phrased its test, it is not clear whether it thought that only one district would exist in which the contacts weighed most heavily, or whether the "significant sales" and "other overt act" parts were in the alternative, with venue possibly lying in each district. Although the latter construction would be preferable, it is slightly strained, given the court's use of the word "most," which implies that only one place would be proper.

The courts that have followed *Philadelphia Housing* have reflected this ambiguity. In *Travis v. Anthes Imperial Ltd.*,<sup>76</sup> a securities fraud case, the district court seized on the word "most" and concluded that venue was not proper in its district, since the weight of contacts lay

terests of those states in the determination of the particular issue,

"(d) the protection of justified expectations,

"(e) the basic policies underlying the particular field of law,

"(f) certainty, predictability and uniformity of result, and

"(g) ease in the determination and application of the law to be applied."

Wechsler, *Introduction to RESTATEMENT (SECOND) OF CONFLICTS* at vii-viii (1971). See also Weintraub, *Beyond Dépeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Commercial Code*, 25 CASE W. RES. L. REV. 16, 17 (1974).

72. 291 F. Supp. 252 (E.D. Pa. 1968).

73. 15 U.S.C. § 15 (1970).

74. *Accord*, United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975); Arnold v. Smith Motor Co., 389 F. Supp. 1020 (N.D. Iowa 1974). But see Albert Levine Associates v. Bertoni & Cotti, 309 F. Supp. 456, 461 (S.D.N.Y. 1970). Accepting the premise that venue statutes should be liberally construed in order to minimize time spent on subsidiary issues, the result stating that the antitrust venue statute merely supplemented the general statute seems wise.

75. 291 F. Supp. at 260-61.

76. 331 F. Supp. 797 (E.D. Mo. 1971), *rev'd*, 473 F.2d 515 (8th Cir. 1973).

overwhelmingly in Canada.<sup>77</sup> The Eighth Circuit reversed,<sup>78</sup> apparently accepting the view that if contacts are ponderous enough, venue is proper, even though they have considerable weight in other districts or jurisdictions as well. Two antitrust cases likewise adopted different interpretations of the *Philadelphia Housing* test. In *ABC Great States, Inc. v. Globe Ticket Co.*<sup>79</sup> the court employed the method used by the *Travis* district court: it looked to the most significant conspiratorial acts for the key to venue, because it feared that a "significant sales causing substantial injury" approach would not limit venue sufficiently, given the nationwide scope of the conspiracy. Implicit in this holding is the value judgment that it is desirable (or perhaps necessary) to limit venue—a questionable assumption if the conspiracy in fact had a substantial effect on a large number of districts. In contrast, a district court applying the weight of contacts test in *California Clippers, Inc. v. United States Soccer Football Association*<sup>80</sup> concluded as did the Eighth Circuit that it had venue upon finding several significant contacts within its own district. It specifically found immaterial the fact that significant contacts had also taken place in other districts. A third court phrased its conclusion about the weight of contacts in the alternative, finding they were either in Virginia or in California, but definitely not in Pennsylvania.<sup>81</sup> Thus, it appeared to be on the side of the *Travis* district court.

Two courts have used the weight of contacts test in a result-oriented way. Both cases were private actions brought under the antitrust laws alleging conspiratorial acts.<sup>82</sup> In an action against the Atlantic Coast Football League, the district court found that plaintiff had failed to prove that the claim arose where "[t]here [was] no indication . . . that the ACFL had a member team or participated in football exhibitions or derived any substantial benefit from activities carried on within this jurisdiction during the pendency of this action."<sup>83</sup> The court's inclusion of derivation of benefit from acts within the district implies

77. 331 F. Supp. at 806.

78. 473 F.2d at 529.

79. 310 F. Supp. 739, 743 (N.D. Ill. 1970).

80. 314 F. Supp. 1057, 1063 (N.D. Cal. 1970).

81. *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F. Supp. 812, 816 (E.D. Pa. 1972).

82. *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565 (N.D. Ill. 1975); *Redmond v. Atlantic Coast Football League*, 359 F. Supp. 666, 670 (S.D. Ind. 1973).

83. 359 F. Supp. at 670, relying on *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968) and *California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057 (N.D. Cal. 1970).

that acts carried on there whose effects are felt elsewhere may establish venue. Another district court established venue in the district where the effects were felt from acts committed elsewhere. In an action against the American Association of Orthodontists for their refusal to certify a part-time school, the Illinois court supported its own venue in part on the basis of conspirators' meetings in Texas and Missouri that were designed to block the Illinois plaintiff's certification.<sup>84</sup> The common thread of these two cases is that in each the court bifurcated act and result for the purpose of venue analysis. Viewing weight of contacts as a liberal, balancing approach, these decisions seem sound. As a *prima facie* matter, either an act or its result should be enough of a contact to secure venue in the district.

The Northern District of Iowa presently holds the prize for the most liberal application to date of the weight of contacts test. In *Arnold v. Smith Motor Co.*<sup>85</sup> the court carefully considered the developments in venue law since the 1966 amendment and analyzed the new statute in light of the policies behind modern venue. It purported to find precedent for an approach in which the court's only task was to refuse venue where the contacts were miniscule.<sup>86</sup> The court finally appealed directly to the purpose and policy of venue to justify its view of the law:

Venue has been considered as the place where jurisdiction may be exercised, and while it affords some protection to defendants, it is designed to facilitate the maximum convenience for *all* the litigants. . . . The 1966 Amendment to § 1391 evidenced a concern for a forum convenient to the aggrieved party as well as the defendant. . . . Modern means of transportation and the availability of a motion for transfer under 28 U.S.C. § 1404 in a case of extreme inconvenience have obviated the need for a strict venue rule based on a theory of geographic hardship to the defendant.<sup>87</sup>

When the 1966 amendment receives this kind of enlightened construction, the law has achieved as much as can be hoped for. To the extent

84. 396 F. Supp. at 574.

85. 389 F. Supp. 1020 (N.D. Iowa 1974).

86. The court cited *Honda Associates, Inc. v. Nozawa Trading, Inc.*, 374 F. Supp. 886 (S.D.N.Y. 1974) for this proposition. 389 F. Supp. at 1023. This seems to turn *Honda* on its head: in that case, the overwhelming weight of contacts was in California. Transferring, the Southern District of New York judge commented that it was unnecessary to decide whether the largest part of a claim arose in his district or merely a substantial part, for it was clear that "the claim should not be deemed to have arisen in a district in which the defendant has had only miniscule contact . . ." 374 F. Supp. at 892. Thus the *Arnold* court's use of *Honda* seems a bit misguided at best.

87. 389 F. Supp. at 1024 (citations omitted).



that the weight of contacts test permits this flexibility, it provides a welcome gloss on the statute. As the cases illustrate, however, the test is not always understood, and when understood, it is not always so hospitably received. Weight of contacts analysis best adapts to conspiracy cases, or to cases involving a large number of acts by businesses or individuals with substantial contacts in many jurisdictions. The weakness of the present law lies in the danger that a court will weigh contacts with an eye to confining the number of districts that will be entitled to adjudicate the case. If as a policy matter the decision were made to permit venue in any forum with a logical connection to the lawsuit, the weight of contacts test would simply help the court to structure its decision on the logic and appropriateness of venue.

2. *Place of injury.*—The place of injury presents the major alternative to the weight of contacts approach.<sup>88</sup> Frequently in this area the test adopted by the court can only be inferred from the opinion; occasionally, a judge affixes a label to his analytic approach. Although courts apply this test most often to tort actions, it too has been used in the antitrust area. The first case to hold that the claim arose in the district where the injury occurred was *Rosen v. Savant Instruments, Inc.*,<sup>89</sup> a wrongful death action. The issue came before the court in the form of a motion to transfer under section 1404(a)<sup>90</sup> from the Eastern District of New York to the District of Rhode Island, where plaintiffs' decedent had been electrocuted. The court granted the transfer, stating simply that the claim obviously did arise in Rhode Island, because that was where the alleged wrongful death occurred.<sup>91</sup> This type of case benefits most from the 1966 amendment, and causes the least difficulty. Even in the tort area, however, the critical injury would be difficult to isolate in a business or products liability context. The fact of the matter is that several districts should all be equally available.<sup>92</sup> Despite the logic of multiple availability, place of injury seems more prone to give rise to indefensible and nit-picking exclusivity: in one patent infringement

88. Compare this with the old vested rights approach to choice of law. See Wechsler, *Introduction*, *supra* note 69; RESTATEMENT OF CONFLICTS §§ 311, 377 (1934).

89. 264 F. Supp. 232 (E.D.N.Y. 1967).

90. Courts do not analyze where a claim arose any differently under the transfer statutes than upon a challenge to plaintiff's initial choice of venue, since a claim "might have been brought" only where venue was initially proper. See *Van Dusen v. Barrack*, 376 U.S. 612, 624 (1964); *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960).

91. See also *Miller v. Cousins Properties, Inc.*, 378 F. Supp. 711 (D. Vt. 1974).

92. As a practical matter, a number of districts are available to the products liability litigator. See, e.g., *Noyer, Problems of Federal and State Court Jurisdiction and Venue in Products Liability Litigation—Defendant's Viewpoint*, 40 J. OF AIR L. & COM. 637 (1974).

case, the court decided that the right to a declaratory judgment arose during a conference in New York, where the patentee threatened litigation, rather than in Ohio, where he filed suit ten days later.<sup>93</sup> In an indemnity case, the court with some justification upheld its own venue by referring back to the place of the original tort to determine where the claim arose.<sup>94</sup> Although sound reasons can be advanced for selecting the place of injury, in an indemnity action an equally persuasive argument can often be made for other locations, such as where the company paid the claim, or the company headquarters. Furthermore, while the logic of these decisions may be supportable after the fact, they offer little assistance as precedent.

The two antitrust cases that have employed the place of injury test are not easily distinguishable from those that used weight of contacts.<sup>95</sup> One possible difference, however, is the fact that both cases using place of injury involved the alleged destruction of one business. The court in each case made the assumption that the place of injury was the same as the company's headquarters, or principal place of business.<sup>96</sup> One judge explained his rejection of the weight of contacts approach by his inability to accept a scheme requiring "an evaluation of a specific calculus of contacts."<sup>97</sup> Certainly the weight of contacts test is vulnerable to charges of subjectivity or arbitrariness, which apparently lay behind the judge's objection. By the same token, place of injury can be accused of undue rigidity. The difficulty lies in the conflicting desires on the one hand for a reliable test, and on the other hand for a test so tailored to the facts under consideration that it produces the most convenient place of trial.

One court employed an inversion of the place of injury approach, turning its gaze to where the litigation results would be felt, in *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western Railroad Co.*<sup>98</sup> Although the court asserted that venue for one defendant, the National Mediation Board, existed under section 1391(e),<sup>99</sup> it had

93. *Uniroyal, Inc. v. Sperberg*, 63 F.R.D. 55 (S.D.N.Y. 1973).

94. *Kroger Co. v. Adkins Transfer Co.*, 284 F. Supp. 371 (M.D. Tenn. 1968), *aff'd sub nom. Kroger Co. v. Dornbos*, 408 F.2d 813 (6th Cir. 1969).

95. *Iranian Shipping Lines, S.A. v. Moraites*, 377 F. Supp. 644 (S.D.N.Y. 1974); *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169 (S.D.N.Y. 1970).

96. In an earlier opinion the *Albert Levine* court suggested that the place where plaintiff's distributorship was located might be where the injury arose. *Albert Levine Associates v. Bertoni & Cotti*, 309 F. Supp. 456, 461 n.9 (S.D.N.Y. 1970).

97. 377 F. Supp. at 647.

98. 290 F. Supp. 612 (D. Colo. 1968), *aff'd*, 411 F.2d 1115 (10th Cir. 1969).

99. 28 U.S.C. § 1391(e) (1970). This subsection establishes venue for suits in which each defendant is an officer or employee of the United States, or an agency of the United States.

to rely on section 1391(b) to sustain venue for the union defendant. In what was probably dictum, the court commented that "[t]hough the particular action which plaintiff seeks to enjoin would be taken in the District of Columbia where the NMB is headquartered, the impact and operation of any such action would be felt in this district and it is here, therefore, that the cause of action arises."<sup>100</sup> What the injunction against the Board had to do with the location of actions taken by the union defendant the court left to the imagination. Nevertheless, the place where the impact of the relief requested from the lawsuit would be felt may be another conceivable place "where the claim arose," although it does seem to put the cart before the horse.

Another variation on place of injury analysis relies more directly on the location of the organization's headquarters as the place where the claim arose, without ever discussing whether or not injury actually occurred there. Thus in *Alameda Oil Co. v. Ideal Basic Industries, Inc.*,<sup>101</sup> the court held that it was preferable to litigate the claim in Colorado, where allegedly deceptive proxies and accompanying statements were prepared by the defendant company, instead of in Missouri, where the materials were received and shareholders presumably deceived. Apparently it felt that the claim "arose" in both districts, since it transferred under section 1404(a). In a case under the statute prohibiting the use of federally appropriated funds to influence a congressman's vote,<sup>102</sup> the court held that a claim against an unincorporated association of state unemployment offices arose in the District of Columbia, since the organization had a central office there, funds were appropriated there, and Congress met there.<sup>103</sup> This "nerve center" type of approach was also applied in a civil rights suit brought to declare unconstitutional a Pennsylvania rule suspending the driver's licenses of automobile accident judgment debtors.<sup>104</sup> On the other hand, in *Jimenez v. Pierce*,<sup>105</sup> a prisoner's civil rights suit in which the plaintiff wanted to sue in the district where the headquarters of the state agency he claimed had injured him was located, the court rejected "nerve center" venue. Plaintiff was incarcerated in the Northern District of New York, and all of the

100. 290 F. Supp. at 616. The court cited Montana and California authority for its conclusion—persuasively, one would hope.

101. 313 F. Supp. 164 (W.D. Mo. 1970).

102. 18 U.S.C. § 1913 (1970).

103. *National Ass'n for Community Development v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973).

104. *Leonhart v. McCormick*, 395 F. Supp. 1073, 1078 (W.D. Pa. 1975).

105. 315 F. Supp. 365 (S.D.N.Y. 1970).

activities listed in his complaint had occurred there. The court held that even if the agency had directed the abuses from the Southern District, the claim did not arise there. All relevant actions had taken place in the Northern District; hence the weight of the contacts existed there. Thus the headquarters test has received some acceptance, but if substantially all of the activities were executed elsewhere, or if judicial economy would be better served elsewhere, a court might order the suit tried in that district, either on weight of contacts or place of injury grounds.

3. *Substantive law.*—In some cases the courts have made no attempt to use a generalized venue test; instead they have searched for rules from a particular substantive field to justify their results. In the area of contracts, the dispute rages over whether the place of negotiations, the place of execution, or the place of performance governs.<sup>106</sup> Unhappily, the courts have viewed these as mutually exclusive. The statute may not compel this interpretation, but the flexible attitude manifested in more complex areas such as antitrust has not been carried over to the more traditional areas. Trademark infringements, for example, might arise in the district in which the products were sold, or they might arise in the district where the name confusion occurred.<sup>107</sup> In addition, by narrowing the inquiry to one substantive topic, the courts have introduced a new complication. If this question is one of substantive law, to which jurisdiction must they look for an answer? Since the Supreme Court has specifically held that venue is procedural,<sup>108</sup> the federal courts should not feel bound by the state law locating a cause of action, although if no federal precedent exists the state rule might provide useful guidelines. Ideally, any of the places commonly recognized as significant to the claim would be permissible for venue.

4. *No reasoning.*—Some cases decided under the amendment concluded so uninformatively that the claim did or did not arise in the district that any attempt to rationalize the decision would be pure

106. See *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970) (contract claim arose in district where contract executed and payments made, not in district where preliminary negotiations took place); *M. Dean Kaufman, Inc. v. Warnaco, Inc.*, 299 F. Supp. 722 (D. Conn. 1969) (contract claim arose in district where contract was formalized, not in district where party failed to perform).

107. See *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 374 F. Supp. 184, 190 (D. Del. 1974) (where confused); *Car-Freshner Corp. v. Broadway Mfg. Co.*, 337 F. Supp. 618, 619 (S.D.N.Y. 1971) (where products sold, not where labels affixed or where goods wrapped).

108. See *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967). Even according to the modern view, choice of law principles usually provide that the forum state procedural rules apply regardless of which substantive law governs. See generally *RESTATEMENT (SECOND) OF CONFLICTS* §§ 122-43 (1971).

speculation. In some cases, the court relied on the facts in the record;<sup>109</sup> in other cases it set out facts that would support venue, but never spelled out the inferences it drew from those facts.<sup>110</sup> In some circumstances the courts referred to the allegations in the plaintiff's pleadings alone<sup>111</sup>—a practice defensible to a point, since under the better view the plaintiff bears the burden of proving venue once the defendant has raised the defense under Rule 12(b)(3) of the Federal Rules of Civil Procedure,<sup>112</sup> but less desirable than reviewing the entire record.<sup>113</sup> Some courts give no clue whatsoever, implicit or explicit, about their reasoning.<sup>114</sup> Perhaps these courts thought the answer so obvious that an explanation would be frivolous. Nevertheless, with the troubles plaguing other courts, it could only help the overall situation to articulate why a particular case was an easy one. Clear understanding of standards is essential if the area is to achieve any certainty and predictability.

5. *Evaluation.*—The consequences of inability to decide where a claim arose have ranged from dismissal of the case, to severance and transfer to another district, to a simple remand for further factfinding. The statute has truly failed in its purpose where, as in *Javelin Corp. v. Uniroyal, Inc.*,<sup>115</sup> a court sees no alternative to dismissal of the suit. In that case, a private antitrust action, the defendants' operations were national in scope, and the defendants themselves were scattered throughout the country. The only significant events in the Northern District of California were an industry-wide sales meeting and a meeting for the alleged purpose of approving illegal exclusionary arrangements. The defendants acted as agents for a manufacturing group within the district. After setting out these facts, the court concluded without further

109. *Miller v. Cousins Properties, Inc.*, 378 F. Supp. 711 (D. Vt. 1974); *Alabama Great Southern R.R. v. Allied Chem. Co.*, 312 F. Supp. 3 (E.D. Va. 1970).

110. *McCrary Corp. v. Cloth World, Inc.*, 378 F. Supp. 322 (S.D.N.Y. 1974); *Junior Spice, Inc. v. Turbotville Dress, Inc.*, 339 F. Supp. 1189 (E.D. Pa. 1972).

111. *D'Amico v. Treat*, 379 F. Supp. 1004 (N.D. Ill. 1974); *Walker v. Kawasaki Motors Corp.*, 62 F.R.D. 607 (E.D. Tenn. 1973); *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc.*, 333 F. Supp. 187 (D. Neb. 1971).

112. See generally 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1352 (1969).

113. See *Davidge v. White*, 377 F. Supp. 1084 (S.D.N.Y. 1974) (case held pending submission of factual affidavits by both parties on the question of venue).

114. *Daugherty v. Procnier*, 456 F.2d 97, 98 (9th Cir. 1972); *Kletschka v. Driver*, 411 F.2d 436, 442 (2d Cir. 1969); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975); *Litton Business Sys., Inc. v. Paul L'Esperance, Inc.*, 387 F. Supp. 1265 (E.D. Pa. 1975); *Besuner v. Faberge, Inc.*, 379 F. Supp. 278 (N.D. Ohio 1974). Cf. *Tiernan v. Westext Transport, Inc.*, 243 F. Supp. 566 (S.D.N.Y. 1965) (§ 1391(f) case); *Smith v. Konsak*, 230 F. Supp. 308 (E.D. Pa. 1964) (same).

115. 360 F. Supp. 251 (N.D. Cal. 1973).

discussion that neither venue nor personal jurisdiction was present in its district and granted the defendants' motion to dismiss the case. Unless a court actually believes plaintiff's claim to be frivolous or in bad faith, it is hard to justify dismissing for improper venue, for section 1406(a) does permit transfer in this situation. Furthermore, the same court several years earlier had applied the weight of contacts test and found that several contacts of significance with the jurisdiction were sufficient to establish venue.<sup>116</sup> If the result in *Javelin* is the harbinger of a trend toward stricter scrutiny of the propriety of venue, then that decision flies in the face of the congressional trend to broaden permissible places of trial. If the discrepancy in the two decisions simply points out the highly subjective nature of the contacts evaluation, then perhaps the courts need a better test or a more workable statutory standard.

In two recent cases, the courts felt it was important to pinpoint the location of the accidents or transactions in order to place venue in the precise district where the claim arose. In the first, *Davidge v. White*,<sup>117</sup> the pleadings lacked sufficient factual allegations to enable the court to make the determination, and therefore the case was remanded. Since the complaint did allege that the claim was for recovery of funds that defendant had obtained in stock transactions occurring within the district, the court's approach was unnecessarily picky. The second, *Chance v. E. I. DuPont de Nemours & Co.*,<sup>118</sup> was a multiple tort action brought in New York, in which children from a number of states were injured by blasting caps. First pointing out that the applicable substantive law was not the law of New York, the court held that "[f]or this and other reasons these actions must be severed and transferred to the federal district court in the respective jurisdictions where the accidents occurred,"<sup>119</sup> citing section 1404(a). Under section 1404(a), each claim "might have been brought" in the state where the child was injured. Considerations of judicial economy could lead either to approval or disapproval of the court's action. On one hand, each child would be trying to prove the same facts against the manufacturer, which argues for keeping the action in New York. On the other hand, the New York court must follow *Erie* and *Klaxon*, which require it to obey the New York conflicts of law rules in a diversity case. It could therefore be in

116. *California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057 (N.D. Cal. 1970).

117. 377 F. Supp. 1084 (S.D.N.Y. 1974).

118. 371 F. Supp. 439 (E.D.N.Y. 1974).

119. *Id.* at 441.

the position of applying the law of six or seven different states in one trial, probably a difficult and time-consuming task. These problems are beyond the scope of the venue statute. Nevertheless, insofar as federal venue is concerned, it should be clear that the New York court could keep the case if it decided in its discretion that the claim arose in the place of manufacture as well as in the place of injury. Hopefully the *Chance* court was transferring "in the interest of justice" and not because it believed it was compelled to refuse venue.

As the variety of tools the courts have evolved to answer the question where the claim arose indicates, the 1966 amendment to the venue statute spawned litigation where none had existed before.<sup>120</sup> Events that give rise to lawsuits do not tend to be packaged neatly with labels informing observers of their origins. At present, venue becomes an issue in the case when the defendant asserts improper venue in a responsive pleading or motion under Rule 12(b)(3).<sup>121</sup> If the defense is not properly raised by a motion or in a responsive pleading, Rule 12(h)(1) provides that it is waived.<sup>122</sup> Once the issue is raised, some confusion exists as to which party bears the burden of proving his point.<sup>123</sup> Professors Wright and Miller take the view that the obligation should be the plaintiff's, since plaintiff must justify jurisdiction.<sup>124</sup> This rule makes sense, provided that the showing plaintiff must make is not too difficult. The best solution to the problems with the current venue statute would require plaintiff to make a prima facie showing of proper venue. To support his chosen forum, plaintiff should need to demonstrate only that the district bears some logical relationship to the claim. The weight of contacts test as applied in *Arnold v. Smith Motor Co.*,<sup>125</sup> mandating rejection only for districts with minuscule contacts, embodies the spirit of this approach. Once plaintiff's prima facie case is made out, defendant could not change districts without a strong showing of incon-

120. Although there has been a fair amount of litigation in the district courts on the meaning of the new phrase, very few cases have reached the courts of appeals. This probably results in part from the newness of the statute, but more importantly from the parties' unwillingness to expend the time and money necessary to litigate venue that persistently. Nevertheless, this puts the district courts in a difficult position, since they lack guidance on the resolution of the problems that have arisen.

121. FED. R. Civ. P. 12(b)(3).

122. *Id.* 12(h)(1).

123. Compare *United States v. Orshek*, 164 F.2d 741 (8th Cir. 1947) (burden on defendant), with *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182 (7th Cir. 1969) (burden on plaintiff).

124. 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1352, at 570 (1969).

125. 389 F. Supp. 1020 (N.D. Iowa 1974).

venience.<sup>126</sup> If defendant were able to meet this stringent test, the court would have the power to transfer under either section 1406(a), if it decided that venue was utterly improper, or under section 1404(a), if it decided that a more convenient district existed. Absent fairly extraordinary circumstances, plaintiff's choice should stand undisturbed.

The American Law Institute's proposal, which provides for venue where "a substantial part of the events or omissions giving rise to the claim occurred,"<sup>127</sup> would facilitate and encourage this approach. The drafters took care to insure that more than one district might satisfy the standard.<sup>128</sup> Although they acknowledged that controversy was possible over what constituted "a substantial part," their feeling was that difficulties would arise only when the plaintiff was taking a deliberate chance.<sup>129</sup> The correctness of this conclusion depends entirely on a court's interpretation of the word "substantial." If it construes the word to include anything not insubstantial or insignificant, like the *Arnold* court, then the drafters were probably right. Subject to a de minimis limitation, plaintiff's choice of venue would always be upheld unless he were guilty of bad faith or unless defendant could persuade the court to transfer on a strong showing of inequity. The danger nevertheless exists that the courts will read "substantial" as something analogous to over fifty percent, or over thirty percent, like the *Chance* court. If this happens, then the ALI's proposal would simply add one more question to be litigated.

It is difficult to capture in words the precise factors that would guarantee the more desirable construction. Perhaps it is better to stop talking about parts of claims and to say simply that the plaintiff's choice of venue should be upheld if his claim bears a logical connection to the forum, unless the defendant makes a satisfactory showing of hardship. Under this formulation, plaintiff's initial showing would be quite easy; in most controverted cases the defendant would bear the burden of upsetting plaintiff's choice. In this way venue matters may be relegated at last to the secondary position they deserve. After all, little harm would result if a federal question case were litigated in one district

126. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *North Branch Prod., Inc. v. Fisher*, 284 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 827 (1961); *Commercial Solvents Corp. v. Liberty Mut. Ins. Co.*, 371 F. Supp. 247 (S.D.N.Y. 1974); *Combustion Eng'r, Inc. v. Black, Sivalls & Bryson, Inc.*, 316 F. Supp. 660 (W.D. Mo. 1970).

127. ALI STUDY, *supra* note 43, §§ 1303, 1314.

128. *Id.* at 137.

129. *Id.*



rather than another. If the premise behind diversity jurisdiction is the need for unbiased, unprejudiced forums for citizens of different states, one federal court should be as good as another. The original court is always free to transfer to a court in the state whose law will apply if the facts warrant the transfer. Plaintiffs should not be forced to second-guess a court's view of where a claim arose if their choice of venue is at all defensible.

### D. Other Problems

1. *Service of process.*—At the time Congress amended the venue statute, commentators criticized the revised version for its continued reliance on the long-arm statute of the forum state with regard to amenability to process.<sup>130</sup> If a defendant was not amenable to process from any district in which venue was appropriate, plaintiff would still be frustrated in his lawsuit. Happily, this has proved to be a lesser problem than the general confusion about the distinction between personal jurisdiction requirements and venue requirements. Service of process is normally controlled by state law, while venue is governed by a federal statute.<sup>131</sup> Yet in one case a federal court relied on state venue decisions to resolve questions of personal jurisdiction.<sup>132</sup> Even worse, another court purported to rely on section 1391 for jurisdiction over the subject matter.<sup>133</sup> Some courts appear to equate amenability to process with satisfaction of venue requirements.<sup>134</sup> Thus the more frequent problem with personal jurisdiction arises from a failure to make a sharp distinction between the concepts of power over the person and convenience of the lawsuit's location; the federal courts' technical dependence on the scope of the applicable state long-arm statute has forced very few dismissals.<sup>135</sup>

130. Foster, *supra* note 51. See FED. R. CIV. P. 4.

131. See notes 142 to 167 *infra* & accompanying text, on the debate over the role state law plays within the federal statute.

132. Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491 (D.S.C. 1970).

133. Langston v. Ciccone, 313 F. Supp. 56 (W.D. Mo. 1970).

134. Colorado-Florida Living, Inc. v. Deltona Corp., 338 F. Supp. 880 (D. Colo. 1972) (same test used to determine transaction of business for purposes of state long-arm statute and federal venue statute "where the claim arose"); Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848 (D. Haw. 1968) (confused constitutional limits of long-arm jurisdiction with venue statute's requirements).

135. The only case since the 1966 amendment to dismiss for personal jurisdiction limitations in the state long-arm statute appears to be Parham v. Edwards, 346 F. Supp. 968 (S.D. Ga. 1972), *aff'd per curiam*, 470 F.2d 1000 (5th Cir. 1973).

2. *Division venue*.—Whether the claim should be heard in one particular division of a district poses a greater problem than service of process. One court, citing sections 1391(b) and 1406(a), transferred a claim to another division within its district.<sup>136</sup> The court's use of section 1406(a) indicates that it thought venue was improper in its own division. This restrictive gloss on the statute is unnecessary, because sections 1391(a) and (b) nowhere mention division, and transfers from one division to another within a single district would do nothing but prolong the litigation.

In *Torres v. Continental Bus Systems, Inc.*,<sup>137</sup> the district court justified its transfer of the case to another division within the district by reasoning that section 1393(a)<sup>138</sup> confers a personal privilege on the defendant to be sued in the division of its residence. Since section 1391(c) makes a foreign corporation suable anywhere that it does business, the corporation is considered a resident of that district for venue purposes. Therefore, the court reasoned, a corporation is a resident of the divisions where it does business for purposes of section 1393(c). The *Torres* court did not consider two arguments later advanced by another district court in *Medicenters of America, Inc. v. T and V Realty & Equipment Corp.*<sup>139</sup> that would lead to a different result. First, section 1393 might come into play only if the defendant's residence is the sole basis for venue. Where venue can rest on another basis, such as the plaintiff's residence or the place where the claim arose, venue is proper in any division within the district. Second, by referring to the place "where *he* resides," Congress may have intended to limit division venue under section 1393(a) to individual defendants. Section 1391 itself uses the pronoun "it" where it intends to refer to corporations, and it avoids pronouns where both corporations and natural persons are covered.<sup>140</sup>

The contrast between the general venue statute and the venue statute governing removal, 28 U.S.C. § 1441(a), also suggests that

136. *Wingard v. North Carolina*, 366 F. Supp. 982 (W.D.N.C. 1973).

137. 204 F. Supp. 347 (S.D. Tex. 1962).

138. 28 U.S.C. § 1393(a) (1970) provides: "Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides."

139. 371 F. Supp. 1180 (E.D. Va. 1974) (alternative holding).

140. Within the general venue statutes, the pronoun "it" refers to a corporation. See 28 U.S.C. § 1391(c) (1970). But see *id.* § 1400(a) (patent and copyright venue—refers to defendant or *his* agent); *id.* § 1401 (stockholder's derivative action venue—refers to stockholder on behalf of *his* corporation). In contrast, sections 1391(a) and (b) do not use pronouns.

division is of no independent significance in the former instance. The removal venue statute expressly directs the court to look to the district and division embracing the place where the action is pending. Thus, removal venue relies indirectly on the venue statute of the state where the action was originally brought. The absence of this kind of limiting language in section 1391, and the undesirability of restricting venue where Congress did not mandate restriction both suggest that division venue should not apply to the language "where the claim arose." Similarly, state statutes setting venue for state lawsuits should be irrelevant, or at most only persuasive authority, in determining federal venue under section 1391.<sup>141</sup>

3. *What law governs.*—At the time Congress amended the venue statute in 1966, the question whether state law or federal law would govern "where the claim arose" would not have been likely to excite controversy. It was "hornbook law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable."<sup>142</sup> Courts regularly recited the need for a uniform federal standard for venue<sup>143</sup> and the unacceptability of permitting state venue laws to interfere with this standard.<sup>144</sup> Thus, after the 1966 amendment had been in operation for a time, it came as a great surprise to many that the problem of applicable law should be an issue at all.

The Sixth Circuit discussed the policies behind the venue statutes in some detail in *Miller v. Davis*,<sup>145</sup> a diversity case. The district court had erroneously concluded that a Kentucky choice of law rule precluded federal jurisdiction. After the court of appeals firmly corrected that misconception, it reached the venue issue. It held explicitly that venue was a procedural matter within the *Erie* doctrine and that state venue law did not control federal venue.<sup>146</sup> The importance of uniform application of the federal venue statutes was too great to permit state laws to

141. See text accompanying notes 142-167 *infra*.

142. *Murphree v. Mississippi Publ. Corp.*, 149 F.2d 138, 140 (5th Cir. 1945), *aff'd*, 326 U.S. 438 (1946). See generally 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 71 (Wright ed. 1960); 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.140 [1.-3-1] (1975). Neither state substantive law nor state venue law should be conclusive on a question of federal procedural law.

143. *Remington Rand, Inc. v. Knapp-Monarch Co.*, 139 F. Supp. 613, 617 (E.D. Pa. 1956).

144. *Standard Ins. Co. v. Isbell*, 143 F. Supp. 910, 912 (E.D. Tex. 1956); *Shaffer v. Tepper*, 127 F. Supp. 892, 894 (E.D. Ky. 1955); *Neal v. Pennsylvania R.R.*, 77 F. Supp. 423, 425 (S.D.N.Y. 1948).

145. 507 F.2d 308 (6th Cir. 1974).

146. *Id.* at 316.

override them.<sup>147</sup>

Confronted with a related issue, the Third Circuit also pointed out that the venue of federal courts is a matter of federal law; a state may not modify or repeal a federal venue statute by its own legislation.<sup>148</sup> This holds true whether subject matter jurisdiction rests on a federal question or on diversity.<sup>149</sup> Other courts have held that federal law governs whether a corporation is "doing business" for section 1391(c) purposes.<sup>150</sup> Many lower courts have supported this view. In *Honda Associates, Inc. v. Nozawa Trading, Inc.*<sup>151</sup> the court said that state personal jurisdiction laws have no effect on the interpretation of the federal venue statute.<sup>152</sup> Other courts have simply reaffirmed the vitality of the old rule that venue fixed by a federal statute must be determined by federal law.<sup>153</sup> The farthest any court has gone without abandoning the principle is to say that state law may be a significant aid in interpreting the federal standard of section 1391.<sup>154</sup> Even this much might be an unnecessary concession.

The district court decision in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*<sup>155</sup> bears responsibility for the notion that state law determines where a claim arose in a diversity case. The court started from the premise that venue is a substantive right, citing the Sixth Circuit's decision in *Still v. Rossville Crushed Stone Co.*<sup>156</sup> as authority.<sup>157</sup> Unfortunately, the court read *Still* incorrectly, although its mistake was understandable, given the confused opinion in *Still*. The *Still* court was considering a traditional local cause

147. *Id.* at 317.

148. *Federal Deposit Ins. Corp. v. Greenberg*, 487 F.2d 9 (3d Cir. 1973). *Cf. Van Dusen v. Barrack*, 376 U.S. 612 (1964) (state law on appointment of ancillary estate administrator does not affect federal venue).

149. 487 F.2d at 12.

150. *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 825 (10th Cir. 1963); *Samson Cordage Works v. Wellington Puritan Mills, Inc.*, 303 F. Supp. 155, 161 (D.R.I. 1969).

151. 374 F. Supp. 886 (S.D.N.Y. 1970).

152. *Id.* at 889. *See International Business Coordinators, Inc. v. Aamco Automatic Transmissions, Inc.*, 305 F. Supp. 361, 364 (S.D.N.Y. 1969) (venue under 15 U.S.C. § 15 (1970)).

153. *Jaffe v. Dolan*, 264 F. Supp. 845, 848 (E.D.N.Y. 1967); *see Iaquina v. Sloan*, 350 F. Supp. 203, 204 (N.D.W. Va. 1972); *cf. Control Data Corp. v. Carolina Power & Light Co.*, 274 F. Supp. 336, 340 (S.D.N.Y. 1967).

154. *Masterson v. First Fed. Sav. & Loan Ass'n*, 53 F.R.D. 313, 316 (E.D.N.Y. 1971).

155. 291 F. Supp. 252 (E.D. Pa. 1968).

156. 370 F.2d 324 (6th Cir. 1966).

157. 291 F. Supp. at 260.

of action.<sup>158</sup> After it distinguished jurisdiction and venue on rather conventional grounds, it proceeded to ask "whether under the law of Tennessee judicial authority could be . . . exercised over the subject matter of this cause."<sup>159</sup> Finding that Tennessee law said that injury to real estate located in another state was not within the jurisdiction of the Tennessee courts, the court quite properly dismissed the case. All it did was apply state substantive law to a local action over which it had diversity jurisdiction, in accordance with the *Erie* doctrine. The Sixth Circuit itself in *Miller*, decided several years after *Philadelphia Housing*, went to some trouble to point out that *Still* was a local action case, having nothing to do with section 1391 venue;<sup>160</sup> it certainly was not a holding that venue is a matter of substantive law. Thus, the entire premise of the *Philadelphia Housing* dictum that state law governs venue determinations under section 1391(a) was faulty.<sup>161</sup>

Notwithstanding the fundamental problem with the *Philadelphia Housing* suggestion for diversity cases, a number of courts accepted the reasoning and applied it in their own decisions. In *Ryan v. Glenn*<sup>162</sup> the court held that the question where the claim arose depended on state substantive law, because "the claim" meant "the aggregate of operative facts giving rise to a right enforceable in the courts,"<sup>163</sup> and it also cited *Philadelphia Housing*. The problem with its first ground of decision is the circularity of the reasoning. One does not have a claim enforceable in the federal courts until he has properly brought himself before the court procedurally, by establishing subject matter jurisdiction, personal jurisdiction over the defendant (or jurisdiction over the res), and venue. Thus it is just as easy to argue that "the claim" refers to federal standards as it is to assert that it must incorporate state law by implication, which would be the legitimate way to bring state law into the picture. The *Ryan* court even conceded that "it might be argued that venue is procedural and purely a question of federal law under *Erie*," but it found the *Philadelphia Housing* view "more practical," and it decided rather arbitrarily to follow it, having found no case law to the

158. The district court in *Graham v. Hamilton County*, 266 F. Supp. 623 (E.D. Tenn. 1967), recognized the old local/transitory distinction at work in *Still*.

159. 370 F.2d at 325.

160. 507 F.2d at 316 n.16.

161. The conclusion was dictum because the case actually before the court was a federal question case, for which the court applied a federal standard.

162. 52 F.R.D. 185, 192 (N.D. Miss. 1971). *Accord*, *Warren Bros. Co. v. Community Bldg. Corp.*, 386 F. Supp. 656, 662 (M.D.N.C. 1974) (dictum).

163. 52 F.R.D. at 192.

contrary.<sup>164</sup> The only conceivable practicality *Philadelphia Housing* could offer would exist if substantive law provided the test for where the claim arose; but as the federal courts develop uniform standards themselves, even in this area the stronger argument lies on the side of a federal test. The other courts that have adopted a state standard have simply assumed that they were required to do so, adding nothing to the rationales of the courts that had preceded them.<sup>165</sup>

Since both *Philadelphia Housing* and *Ryan* came after the Supreme Court's decision in *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*,<sup>166</sup> it is curious that the courts could have reached the conclusion that the 1966 amendment required reference to state substantive law for the first time. The Court, albeit in the context of deciding whether the amendment could be applied to pending cases, clearly stated that the revision did not change the substantive law applicable to the case, and that it was wholly procedural.<sup>167</sup> Logic, as well as preamendment precedent and the holding of *Denver & Rio Grande*, compels the conclusion that federal law alone governs the question of federal venue. A contrary deduction based on a misunderstanding of one brief per curiam court decision is neither desirable nor inevitable.

### III. Conclusion

Despite the problems that have arisen, the 1966 amendment to the federal venue statute was a step in the right direction. Many of the difficulties encountered in the construction of the phrase added by the amendment would be obviated if the requirements for plaintiff's prima facie showing were extremely light, and the burden heavy on the defendant seeking to move the case. In addition, it should be clear that any district with more than miniscule contacts would satisfy the statute, either by reading the present language broadly or by adding a logical connection standard. This would be entirely consonant with the liberalizing purpose behind the amendment; any inequities caused by the rule could be alleviated by judicious use of the transfer statutes. If the statute

164. *Id.* The court does cite Comment, *Federal Venue Amendment—Service of Process, Erie and Other Limitations*, 16 CATH. U.L. REV. 297 (1967).

165. *Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp.*, 358 F. Supp. 1345 (S.D. Tex. 1973); *Paragon Int'l N.V. v. Standard Plastics, Inc.*, 353 F. Supp. 88, 91 (S.D.N.Y. 1973).

166. 387 U.S. 556 (1967).

167. *Id.* at 563. See note 142 *supra*.

is applied and construed in a generous spirit, statutory change is probably unnecessary. The courts must articulate fully the bases for their decisions, so that the analytic approaches they are using will develop stability. Finally, uniformity and certainty in venue law cannot be realized until the courts recognize that federal law governs the question where the claim arose in diversity as well as federal question cases. By deciding that the primary goal is to litigate cases on the merits, rather than on subsidiary procedural issues, the federal courts will find it easier to administer the statutory scheme for venue in the best interest of both the litigants and the judiciary.